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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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8 ATTORNEYS FOR DEFENDANT,
1-800 CONTACTS, INC.

9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 ROBERT REED, INDIVIDUALLY AND ON
12 BEHALF OF ALL OTHERS SIMILARLY SITUATED,

13 PLAINTIFF,

14 v.

15 1-800 CONTACTS, INC., A DELAWARE
CORPORATION; AND DOES 1-50, INCLUSIVE.

16 DEFENDANTS.

CASE NO:

12CV2359 JM BGS

NOTICE OF REMOVAL

NOTICE OF REMOVAL
CASE NO.

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, as amended by the Class Action Fairness Act of 2005 ("CAFA"), 1-800 Contacts, Inc. ("1-800 Contacts") hereby removes this action from the Superior Court of the State of California, County of San Diego, to the United States District Court for the Southern District of California. The grounds for removal are as follows:

1. On August 15, 2012, Plaintiff Robert Reed ("Plaintiff") filed a Complaint in the Superior Court of the State of California for the County of San Diego against 1-800 Contacts, Inc., Case No. 37-2012-00102442-CU-MC-CTL (the "Complaint"). Attached hereto as Exhibit "A" are true and correct copies of the Complaint, Summons, Civil Case Cover Sheet, and ADR Information Packet.

2. On September 27, 2012, 1-800 Contacts filed and served an Answer to the Complaint, a true and correct copy of which is attached hereto as Exhibit "B."

3. Exhibits "A" and "B" constitute all the process, pleadings, notices and orders delivered to any party in the Superior Court action, and are hereby incorporated by reference.

4. On August 29, 2012, the Complaint was personally served on 1-800 Contacts' registered agent for service of process. Accordingly, this Notice of Removal is timely, as it is filed within thirty (30) days of 1-800 Contacts' receipt of the Complaint. *See* 28 U.S.C. §1446(b).

REMOVAL IS PROPER UNDER CAFA¹

5. This action is a civil action which may be removed to this Court by 1-800 Contacts pursuant to the provisions of 28 U.S.C. §§ 1332(d), 1441, and 1453.

6. The Complaint was filed by Plaintiff on behalf of a putative class defined as: "All natural persons who, while residing in and physically present in the State of California, and during the applicable statute of limitations: (1) participated in at least one telephone communication with a live representative of defendants that was recorded by defendants; (2) were not notified by defendants that their telephone communication was being recorded; and (3)

¹ This Notice of Removal is based on the allegations in the Complaint, and is filed subject to and with full reservation of rights. No admission of fact, law or liability is intended by this Notice of Removal, and all defenses, motion and pleas are expressly reserved.

are identifiable through defendants' records. Excluded from the class are all employees of defendants, all employees of defendants' counsel, and all employees of plaintiff's counsel." (Complaint ¶ 9.) The Complaint further alleges that "during the twelve months preceding the filing of this Complaint, defendants routinely recorded incoming and outgoing telephone communications with customers who resided in and were physically present in the State of California without notifying the customers that the communications were being recorded." (Complaint ¶ 6.)

7. The Complaint asserts one cause of action for violation of California Penal Code section 630 *et seq.*, and pursuant to Penal Code section 637.2, seeks \$5,000 in statutory damages per recorded communication for Plaintiff and the Class members.

8. CAFA provides that a class action against a non-governmental entity may be removed if (1) the number of proposed class members is not less than 100; (2) any member of the proposed class is a citizen of a State different from any defendant; and (3) the aggregate amount in controversy, exclusive of interest and costs, exceeds \$5,000,000. The Declaration of Jason Campbell In Support of Notice of Removal ("Campbell Decl.") is being filed concurrently with this Notice of Removal.

NUMEROSITY

9. The Complaint alleges that "the Class consists of well over 100 members." (Complaint ¶ 12.)

DIVERSITY OF CITIZENSHIP

10. Plaintiff is a citizen and resident of the State of California. (Complaint ¶ 1.) Plaintiff seeks to represent a class of California residents. (Complaint ¶ 9.) 1-800 Contacts is a Delaware corporation, with its principal place of business in Utah. Accordingly, the "minimal diversity" requirement that "any member of a class of plaintiffs is a citizen of a State different from any defendant" under CAFA is satisfied for purposes of removal of this action. 28 U.S.C. § 1332(d)(2)(A).

MATTER IN CONTROVERSY IN EXCESS OF \$5,000,000

11. Where the complaint does not specify the amount of damages sought, the

1 removing defendant's burden to establish amount in controversy is by a "preponderance of the
2 evidence." *Abrego v. Dow Chemical Co.*, 443 F.3d 676, 683 (9th Cir. 2006) (sufficient evidence
3 shows "more likely than not" that jurisdictional minimum is met). "The demonstration concerns
4 what the Plaintiff is claiming (and thus the amount in controversy between the parties) not
5 whether Plaintiff is likely to win or be awarded everything." *Brill v. Countrywide Home Loans,*
6 *Inc.*, 427 F.3d 446, 449 (7th Cir. 2005).

7 12. CAFA provides that "[i]n any class action, the claims of the individual class
8 members shall be aggregated to determine whether the matter in controversy exceeds the sum or
9 value of \$5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6). In the Complaint,
10 Plaintiff seeks statutory damages under Penal Code section 637.2 in the amount of \$5,000 for
11 Plaintiff and each class member. (Complaint ¶ 19.) Thus, for purposes of illustration, the
12 amount in controversy requirement is met by a class of over one thousand members.

13 13. For the 12 months preceding the filing of the Complaint, thousands of telephone
14 calls were received from California to 1-800 Contacts' Call Center. (Campbell Decl. ¶ 3.)

15 14. Accordingly, based on the Complaint's allegations and 1-800 Contacts' call
16 volume from California, the \$5,000,000 amount in controversy requirement is easily exceeded
17 here, exclusive of interest and costs.

18 15. This action does not fall within any of the exclusions in 28 U.S.C. §§ 1332(d) and
19 1446 because 1-800 Contacts is not a citizen of the forum state of California.

20 16. For all the foregoing reasons, this Court has original jurisdiction under 28 U.S.C.
21 §§ 1332(d), 1441, 1446 and 1453.

22 17. Counsel for 1-800 Contacts certifies, pursuant to 28 U.S.C. § 1446(d), that it will
23 promptly give notice of filing this Notice of Removal to Plaintiff through his counsel of record
24 and will promptly file with the Clerk of the Superior Court of the State of California, County of
25 San Diego, a copy of this Notice of Removal.

1 Dated: September 27, 2012

FOLEY & LARDNER LLP
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4 By: 

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